

RENDERED: MAY 8, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2019-CA-000256-MR

JUSTIN RIGSBY

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE ROBERT B. CONLEY, JUDGE  
ACTION NO. 16-CI-00557

OUR LADY OF BELLEFONTE HOSPITAL, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CALDWELL, DIXON AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Justin Rigsby (“Appellant”) appeals from an order of the Greenup Circuit Court granting summary judgment in favor of Our Lady of Bellefonte Hospital, Inc. (“Appellee”). Appellant argues that the circuit court erred in failing to employ a fact-based comparative fault analysis, that there was sufficient proof to shift the burden of proof to Appellee, that summary judgment

was not warranted because his injury was foreseeable, and that there is a factual dispute that precludes summary judgment. For the reasons addressed below, we find no error and affirm the order on appeal.

### **FACTS AND PROCEDURAL HISTORY**

On January 14, 2016, Appellant was admitted to Appellee's hospital facility after experiencing gastrointestinal bleeding for several days. Two days after being admitted, he got out of bed and began walking toward the bathroom. Appellant slipped on what he would later claim was a puddle of unknown liquid on the floor. Appellant fell to the ground, injuring his back and hitting his head on the floor. He claimed that immediately prior to the incident, a nurse had exited the room in order to get him something to drink.

On December 22, 2016, Appellant filed a premises liability action against Appellee in Greenup Circuit Court. He asserted that he was an invitee at Appellee's facility, and that Appellee breached its duty to maintain the floor in a safe condition, which resulted in his injuries.

The matter proceeded in Greenup Circuit Court and discovery was undertaken. On August 28, 2018, Appellee filed a motion for summary judgment in which it argued that Appellant, by his own admission, did not know if a substance was on the floor, could not establish the presence of any substance, and identified no witnesses who would testify as to the presence of a substance. As

such, Appellee argued that Appellant could not prove a claim of premises liability if the matter went to trial.

A hearing on the motion was conducted on October 18, 2018, resulting in a January 14, 2019 order granting Appellee's motion. In support of the order, the circuit court determined that Appellant failed to establish a *prima facie* case of premises liability; that he did not establish the existence of a genuine issue of material fact as to whether a dangerous condition existed prior to his fall; and that he could not demonstrate an issue of fact as to how long the substance had been on the floor. In addition, the circuit court determined that Appellant failed to establish the existence of a genuine issue as to whether Appellee breached a duty that was a substantial factor in causing the alleged injuries.<sup>1</sup> This appeal followed.

### **ARGUMENTS AND ANALYSIS**

Appellant argues that the Greenup Circuit Court committed reversible error in granting Appellee's motion for summary judgment. He directs our attention to *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015), for the proposition that every landowner owes a duty to exercise reasonable care to protect against foreseeable injuries, and that summary judgment in premises liability cases should not be granted except in very limited circumstances. Appellant argues that

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<sup>1</sup> Appellant also filed a medical malpractice claim. At the hearing, Appellant's counsel stated that he would not assert a medical malpractice claim at trial.

there remains a question of fact as to whether Appellee's nurse created or left behind a puddle in Appellant's hospital room without informing him of it. Citing *Martin v. Mekanhart Corp.*, 113 S.W.3d 95, 98 (Ky. 2003), Appellant goes on to argue that summary judgment was erroneous because there was sufficient evidence to shift the burden of proof to Appellee. He maintains that he was an invitee at Appellee's facility, that he is not required to prove how long the puddle was there before the incident, and that genuine issues of material fact remain for adjudication. He requests an opinion reversing the summary judgment and remanding the matter for trial.

We must first note that Appellant has not complied with Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v), which requires that the appellant state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985). "In *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990), we established the principle that, where an appellant fails to comply with CR 76.12(4)(c)(iv), a reviewing court need only undertake an overall review of the record for manifest injustice. We believe that principle applies as well to the failure to comply with CR 76.12(4)(c)(v)." *J.M. v.*

*Commonwealth, Cabinet for Health and Family Services*, 325 S.W.3d 901, 902 n.2 (Ky. App. 2010). As in *J.M.*, we have chosen the less severe alternative of reviewing the proceeding below for manifest injustice rather than summarily affirming the decision of the trial court. “Manifest injustice is found if the error seriously affected the fairness, integrity, or public reputation of the proceeding.” *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky. 2013) (citation omitted).

Appellee filed its motion for summary judgment on August 28, 2018. Appellant did not file a responsive pleading, and did not move for reconsideration of the circuit court’s January 14, 2019 order of summary judgment. The order granting summary judgment is not preserved for appellate review, as “the claimed assignment of error was [not] properly objected to or brought to the attention of the trial judge.”<sup>2</sup> *Elwell*, 799 S.W.2d at 47 (citation omitted).

After conducting a hearing on the motion, the Greenup Circuit Court characterized the dispositive question as whether Appellant established a *prima facie* case of premises liability against Appellee. In a premises liability action, the invitee or customer has the burden of proving that

- (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises;

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<sup>2</sup> Appellant asserts in the “Argument” portion of his appellate brief, though not at the beginning of the Argument, that the matter is preserved by way of the October 18, 2018 hearing on Appellee’s motion for summary judgment. This hearing did not preserve Appellant’s claim of error, as the purported error occurred as a result of the hearing, and the order granting summary judgment was not subsequently objected to nor brought to the attention of the trial judge as required by *Elwell*.

(2) the encounter was a substantial factor in causing the accident and the [invitee's] injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees.

*Bartley v. Educ. Training Sys., Inc.*, 134 S.W.3d 612, 616 (Ky. 2004) (citation omitted). Such proof creates a rebuttable presumption sufficient to avoid a summary judgment, and “shifts the burden of proving the absence of negligence, *i.e.*, the exercise of reasonable care, to the party who invited the injured customer to its business premises.” *Id.* (citation omitted).

Appellant acknowledged by way of deposition that he could not remember getting out of bed or taking a step, that he did not have any evidence that there was a foreign substance on the floor, and that he merely assumed there was something on the floor. Rigsby Deposition, December 4, 2017, at p. 59. This testimony supports the circuit court's conclusion that Appellant could not prevail on his burden of proving that he had an encounter with a dangerous substance on the floor, nor that the purported substance was a substantial factor in causing the injury.

The parties were given ample discovery culminating in Appellee's motion for summary judgment. The record reasonably supports the circuit court's determination that there was no genuine issue of material fact and that Appellant

could not prevail if the matter proceeded to trial. CR 56.03; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

### CONCLUSION

Appellant received a hearing on Appellee's motion for summary judgment, after which the circuit court determined that no genuine issue remained for adjudication and that Appellant had not established a *prima facie* case of premises liability. This conclusion is supported by the record. It was based in part on Appellant's acknowledgement in his deposition that he did not remember the incident at issue, and assumed, but could not demonstrate, that a foreign substance on the floor caused him to fall. We find no manifest injustice in these proceedings, and accordingly affirm the January 14, 2019 order of the Greenup Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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